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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. .....71 - 395

AUDIE STONE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

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NO. .....

AUDIE STONE,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Audie Stone prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Tennessee entered in this cause on June 21, 1971.

CITATIONS TO OPINIONS BELOW

Opinions of the Supreme Court of Tennessee are unreported and are not marked for publication. Copy of the original opinion of the Supreme Court of Tennessee is annexed hereto at A1. Opinion of the Court of Criminal Appeals of Tennessee dated April 6, 1971, is annexed at A3.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered June 21, 1971, and jurisdiction here is invoked under 28 U.S.C. 1257 (3).

HOW FEDERAL QUESTION IS RAISED

In order to present this matter in the most favorable light to the State of Tennessee, we shall quote verbatim pertinent portions from the Brief of the Attorney General of Tennessee which was filed in this cause, as follows:

"That, on March 25, 1970, Plaintiff-in-Error, Audie Stone, hereinafter referred to as the Defendant, was convicted by a jury in Bradley County Criminal Court of petit larceny (Case No. 41) and assault and battery (Case No. 42). That the defendant was sentenced to serve a term of not less than, nor more than one (1) year in the State Penitentiary for the larceny conviction and was fined one hundred dollars ($100.00) and costs for the assault and battery conviction. (Case No. 41-TR. 8-9) (Case No. 42-TR. 7-8) (BE. 74-75) .....

That, on April 10, 1970, the defendant filed motions for a new trial (Case No. 41-TR. 12-14) (Case No. 42-TR. 11-13), which were overruled by the Trial Court on May 11, 1970. (Case No. 41-TR. 15-16) (Case No. 42-TR. 14-15) That in its orders overruling the motions for new trials, the Trial Court granted the appeals prayed for and the defendant was given ninety (90) days to file his Bill of Exceptions and otherwise perfect his appeals. (Case No. 41-TR. 15-16) (Case No. 42-TR. 14-15)

That, on July 10, 1970, the defendant filed a voluntary waiver of appeal and a petition for parole and/or suspension of sentence, pursuant to T.C.A. 40-2901 et seq., in both cases. (Case No. 41-TR. 17-20) (Case

No. 42-TR.16-19)

That on July 17, 1970, the Trial Court entered orders in both cases denying the defendant's motions for a suspended sentence and further ordering the defendant to begin serving his sentences. (Case No. 41-TR. 22-23) (Case No. 42-TR. 21-22)

That on July 24, 1970, the defendant filed, in both cases, a motion to withdraw waiver of appeal. (Case No. 41-TR. 24) (Case No. 42-TR. 23) That, also on this date, the Trial Court entered an order in both cases allowing the waivers of appeal to be withdrawn and allowing to perfect an appeal to this Court. (Case No. 41-TR. 25-26) (Case No. 42-TR. 24-25)."

Present counsel did not represent petitioner in the Trial Court or in the Court of Criminal Appeals or in the Supreme Court of Tennessee.

At the very beginning of this trial counsel for the petitioner attempted to seek a continuance by reason of the petitioner's illness, and the Court stated:

"Mr. Summers, if you are making a motion for a continuance, I am going to overrule you. I talked to his doctor personally, and his doctor assured me that he was well able to stand trial, so I am going to overrule you. Now, what else do you have, sir?

"Mr. Summers: Your Honor, can I put on proof for the record?

"The Court: No, sir, I am not going to put on any proof. I have talked to the doctor, and the doctor isn't here.

"General Taylor: is he making a motion for a continuance?

"The Court: Yes, sir, and I am overruling it.

"General Taylor: What is the grounds?

"The Court: Well, I have already overruled the matter. It doesn't make any difference now. Now, what else do you have?

"Mr. Summers: May I respectfully note an exception? (TR. p. 2)

Tennessee Code Annotated, Sec. 40-2403 provides that the defendant desiring to testify shall do so before any other testimony for the defense is heard by the Court trying the case. At the conclusion of the State's proof counsel for the petitioner made the following motion:

"Your Honor, I would like to make a motion, and of course, I know what the law is, but I feel like it is a law that might possibly ought to be changed, and I have raised it one time, but unfortunately I won the case, so I didn't have a chance to, but Your Honor, the State of Tennessee requires that if the defendant is to testify, he is to be the first witness for the defense. I feel like at this time I cannot determine whether I wish to put Mr. Stone on or not, and I therefore, would ask, and I feel that this Statute is unconstitutional based on the fact that it makes a man be a witness against himself. Now at this time I do not feel that the State has made out a sufficient case for me to put him on, but after hearing my own witnesses it may be necessary. Therefore, I would ask the Court, I would like to put other proof on ahead of Mr. Stone and reserve the right to put him on if I so deem at the end of my proof.

"The Court; All right. Let it be overruled." (TR. p. 37)

It is appalling that the Attorney General of Tennessee would insist to the Supreme Court of Tennessee and to the

Court of Criminal Appeals that petitioner had received a fair and impartial trial and had been convicted by due process of law. Even going so far as to indicate that by choosing probation, then he is estopped from appealing. The fallacy in this analogy is that this defendant was never placed on probation. In fact, it appears to be a comedy of errors. The Court then allowed the withdrawal of waivers of appeal. The thought is then projected as to the entry of an order more than thirty (30) days after the judgment became final. Even so, the Bill of Exceptions was prepared and filed within the period of ninety (90) days, and the Assignment of Errors and Brief were also filed within the correct period of time.

The evidence upon which petitioner was convicted consists of the following:

Petitioner owned a restaurant and truck stop which catered to the public. Between 1:00 and 1:30 A. M., on February 14, 1970, James Constable in company with his wife, sister-in-law and brother-in-law, stopped at defendant's restaurant on their return trip from Florida to Ohio. Constable's wife requested of petitioner water and ice in a cup, for which he made a charge of 25¢. Mrs. Constable went outside to obtain the money from her husband who was in the car, and the petitioner followed. There seems to be a conflict as to what occurred outside of the restaurant. Part of the testimony indicates that petitioner demanded of Constable a dollar, and in this discussion petitioner hit Constable in the head with a pistol. On the other side of the coin, he pulled a knife on petitioner, and petitioner then hit him in the head with a gun, and that Constable threw a dollar bill on the ground.

The jury returned a verdict of petit larceny and a sentence of one year as to one case, and returned a verdict

as to assault and battery and a fine of one hundred dollars ($100.00) in the other case.

QUESTION PRESENTED

Was petitioner denied due process of law and equal protection of the law guaranteed him under the Fifth and Fourteenth Amendments to the Constitution, by reason of his being deprived of a fair and impartial trial and appeal?

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent portions of the Fifth Amendment to the Constitution of the United States provide:

> "No person shall be * * * deprived of life, liberty or property, without due process of law; . . ."

Pertinent provisions of the Fourteenth Amendment to the Constitution of the United States provide:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

REASONS FOR GRANTING THE WRIT

The question presented here is of major importance and extremely significant to the administration of justice. It is of utmost importance that no one be imprisoned without a fair and impartial trial and a fair and impartial consideration of an appeal, irregardless of semantics.

The conviction of the petitioner is shocking to the conscience. The basis for the conviction is unfathomable, unless it was caused by the demeanor of the Trial Court and the unusual item of a cup of ice causing the controversy.

Counsel for the petitioner in the Trial Court took a premeditated gamble in not placing the petitioner on the stand first as required by Tennessee law. *Clemons v. State*, 92 Tenn. 282; 21 S.W. 525.

Instead a motion was made to allow the petitioner to be placed on the stand at the conclusion of all of the witnesses for the defense. What happened, of course, was that the petitioner was never placed upon the stand.

Counsel for petitioner could have preserved his rights by taking an exception to the Court's ruling and then placing the petitioner on the stand first and then the remainder of the witnesses. Such action by counsel for petitioner in the Trial Court can only be viewed in its best light as incompetence. Certainly petitioner should have had an opportunity to be represented by competent counsel wherein all of his rights would be protected. The simple reading of the Statute and some case law would make even a wayfaring fool knowledgeable as to being mandatory and imperative that petitioner take the stand first. Such action on the part of counsel for petitioner at the Trial Court amounts to the highest incompetence, for you cannot play with liberty of an individual like the cast of dice. Liberty is something that must be safe-guarded jealously and not thrown away on the premise of testing a known law which had been in existence since 1887. The representation was so lacking in diligence and competence that it reduced the trial to a mockery of justice.

The Fifth Amendment guarantees protection to everyone against conviction not pursuant to due process. The action of the Court in now allowing the petitioner to testify last indicates on its face that the Tennessee Statute is unconstitutional, for it restricts the petitioner's presentation of his defense. Where the action of a State, through either its executive, legislative, or judicial branches violates a federal right, the State thereby violates the Fourteenth Amendment with respect to due process and privileges and immunities. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065; *Escabedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792.

Due process requires that action by a State through any of its agencies must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which are infrequently designated as the law of the land. *Buchalter v. People of State of N. Y.*, 319 U.S. 427, 63 S. Ct. 1129.

Due process is aptly defined in *Briethaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, wherein the Court said that it is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.

Normally the decision of the Supreme Court of Tennessee is entitled to great weight. However, the apparent lack of concern by the Court is self evident in making the decision on a motion to dismiss. Said decision was predicated on a false premise in that petitioner had not accepted the benefits of probation. This Court has stated in apply-

ing the due process clause, that this Court must move within the limits of accepted notions of justice, and as important safeguard against such merely individual judgment is an alert deference to the judgment of the State Court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty. *Malinsky v. People of State of N. Y.*, 324 U.S. 401, 65 S. Ct. 781.

CONCLUSION

Justice requires that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

THOMAS W. THOMSON
911 Bank of Knoxville Building
Knoxville, Tennessee

Counsel for Petitioner

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

AUDIE STONE,
Plaintiff-in-Error

V.

STATE OF TENNESSEE,
Defendant-in-Error

BRADLEY COUNTY
NOS. 41 & 42

ORDER

(Filed April 6, 1971)

This cause came on to be heard today upon the state's motion to dismiss the appeals herein; and, after hearing argument of counsel and considering the records herein, this Court is of the opinion that the state's motion is well taken and should be sustained.

IT IS, THEREFORE, ORDERED that the appeals in these cases are hereby dismissed. The plaintiff-in-error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of appeal. A procedendo will issue to the said Criminal Court of Bradley County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

Entered this 6th day of April, 1971.

/s/ Mark A. Walker
MARK A. WALKER
Presiding Judge

/s/ Robert K. Dwyer
ROBERT K. DWYER, Judge

/s/ William S. Russell
WILLIAM S. RUSSELL, Judge

Office of CLERK OF SUPREME COURT
For the Eastern Division of the
State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order of said Court, pronounced at its September term, 1970, in the case of AUDIE STONE against STATE OF TENNESSEE as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 9th day of September, 1971.

/s/ John A. Parker, Clerk

SUPREME COURT OF TENNESSEE AT KNOXVILLE
SEPTEMBER TERM 1970

DECREE

(Filed June 21, 1971)

Audie Stone
Vs.
State of Tennessee

Bradley Criminal
WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Bradley County, opinion and ..... of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner Audie Stone will pay the costs incident to filing petition for certiorari, for which let execution issue.

ROSS W. DYER, J.
LARRY CRESON, J.
George F. McCanless, J.

Office of CLERK OF COURT OF CRIMINAL APPEALS
For the Eastern Division of the
State of Tennessee

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